Mohd Yusof bin Mohamad v Kerajaan Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — SUMMONS NO S2-21-92 OF 1993
KAMALANATHAN RATNAM J
18 JANUARY 1999

Administrative Law *— Rights and liabilities of public servants — Dismissal — Dismissal from Police Force, whether dismissal wrongful — No evidence in support of prima facie case was before the court — Whether judicial interference where executive has exclusive information could be construed as judicial encroachment upon independence of executive*

The plaintiff was an Inspector with the Royal Malaysian Police Force and was promoted to the rank of Assistant Superintendent of Police in July 1988. By a letter dated 20 February 1990, the plaintiff was asked to show cause why he should not be dismissed from service pursuant to General Order (GO) 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. The plaintiff was also given 16 days from the date of receipt of the letter to make written representation to the Police Force Commission ('the second defendant'). Accordingly, on 28 March 1990, the plaintiff made a written exculpatory representation. By a letter dated 10 September 1991, the plaintiff was informed that he had been dismissed from service with effect from the date of receipt of the letter. The plaintiff appealed to various parties to no avail. The plaintiff applied for a judicial review on the decision by the second defendant to dismiss him. He sought a declaration that his dismissal was null and void, and that he should be reinstated. He also sought for an order that an account be taken of all salaries, emoluments and other benefits lawfully due to him from the date of his dismissal and that the same be paid to him with costs.

Held, dismissing the application with costs:

(1) On the facts, the High Court would not be in a position to assess whether the decision to dismiss was a reasonable decision since the appropriate disciplinary authority's evidence in support of a prima facie case was never before the court (see p 293H–I).

(2) Any judicial interference, in matters where the executive had exclusive information and upon which it had acted, could be readily construed as judicial encroachment upon the independence of the executive (see p 294H).

[Bahasa Malaysia summary

Plaintif adalah seorang Inspektor berkhidmat dengan Pasukan Polis Diraja Malaysia dan telah dinaikkan pangkat kepada Timbalan Penguasa Polis pada Julai 1988. Melalui sepucuk surat bertarikh 20 Februari 1990, plaintif telah diminta memberi sebab mengapa beliau tidak patut diberhentikan daripada perkhidmatan mengikut

Perintah Am (PA) 26 Perintah-Perintah Am Pegawai-Pegawai Perkhidmatan Awam (Kelakuan dan Tatatertib) (Bab D) 1980. Plaintif telah diberikan tempoh masa 16 hari dari tarikh penerimaan surat tersebut untuk mengemukakan satu pernyataan bertulis kepada Suruhanjaya Pasukan Polis ('defendan kedua'). Oleh itu, pada 28 Mac 1990, plaintif telah membuat satu pernyataan bertulis untuk membela dirinya. Melalui sepucuk surat bertarikh 10 September 1991, plaintif telah dimaklumkan bahawa beliau telah diberhentikan dari perkhidmatan bermula dari tarikh surat tersebut diterima. Plaintif telah merayu kepada pelbagai pihak tetapi tidak berjaya. Plaintif telah memohon untuk kajian semula kehakiman ke atas keputusan defendan kedua untuk memberhentikan perkhidmatannya. Beliau juga meminta satu deklarasi bahawa pemberhentiannya adalah batal dan tidak sah, dan supaya beliau ditempatkan semula. Beliau juga meminta satu perisytiharan bahawa satu kiraan perlu dibuat bagi segala gaji, emolumen dan faedah-faedah lain yang mengikut undang-undang tertunggak kepadanya dari tarikh dia diberhentikan kerja dan bahawa kesemua itu dibayar kepada beliau dengan kos.

Diputuskan, menolak permohonan dengan kos:

(1) Berdasarkan fakta-fakta kes, Mahkamah Tinggi tidak akan berada dalam kedudukan untuk menilai sama ada keputusan untuk memberhentikan kerja adalah satu keputusan yang munasabah kerana keterangan pihak berkuasa disiplin yang berkenaan yang menyokong kes prima facie tersebut tidak pernah dikemukakan kepada mahkamah (lihat ms 293H–I).

(2) Sebarang campur tangan kehakiman, di dalam hal-hal yang mana pihak eksekutif mempunyai maklumat ekslusif dan telah bertindak mengikut maklumat itu, boleh dianggap sebagai pencerobohan kehakiman terhadap kebebasan pihak eksekutif (lihat ms 294H).]

Notes

For cases on whether dismissal from Police Force was wrongful, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 519–525.

Cases referred to

Associated Provincial Picture House v Wednesbury Corp [1948] 1 KB 223 (refd)

Ekambaran a/p Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors [1997] 2 MLJ 454 (distd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114 (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Haji Mohd Noh [1997] 1 MLJ 789 (refd) A

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153 (follD)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (follD)

Teh Guan Teck v Inspector-General of Police & Anor [1998] 3 MLJ 137 (refd) B

Legislation referred to

Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 general orders 4(2)(g), 23, 26(2) C

S Selvi (*Azura Alias* with her) (*Gooi & Azura*) for the plaintiff.

Azizah Haji Nawawi (Attorney General's Chambers) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam J: D

Facts

The plaintiff, an Inspector in the Royal Malaysian Police Force, was first appointed on probation in October 1973 and permanently appointed to the rank of Inspector in November 1976. In July 1988, he was promoted to the rank of Assistant Superintendent of Police and in November 1989, he was awarded the Ahli Mangku Negara (AMN). E

By a letter dated 20 February 1990, the plaintiff was asked to show cause why he should not be dismissed from service pursuant to General Order ('GO') 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 on the grounds contained in the three charges, the details of which are irrelevant for the purposes of this decision. F

The plaintiff was also given 16 days from the date of receipt of the said letter to make a written representation to the Police Force Commission, the second defendant. Accordingly, on 28 March 1990 the plaintiff made a written exculpatory representation. By a letter dated 10 September 1991 the plaintiff was informed by the second defendant that he had been dismissed from service with effect from the date of receipt of the said letter. The plaintiff made various appeals to various parties. G

Dissatisfied with the decision of the second defendant, he commenced an action in the High Court of Kuala Lumpur on 7 Ogos 1993 seeking a declaration that his dismissal was null and void, and that he should be reinstated. He also sought for an order that an account be taken of all salaries, emoluments and other benefits lawfully due to him from the date of his dismissal and that the same be paid to him with costs. H

Certiorari or declaration I

When the trial first came up for hearing it was adjourned pending the decision of the Federal Court on the question as to which was the correct

A procedure for a police officer, dismissed by a disciplinary body, to challenge the decision, that is, whether he ought to proceed by way of a declaration or certiorari. The Federal Court in *Teh Guan Teck v Inspector-General of Police & Anor* [1998] 3 MLJ 137 (FC) decided that both declaration and certiorari were concurrent remedies and that both could be available to an aggrieved party. This issue having been put to rest, parties then proceeded B with the case.

Case for the plaintiff

By way of his amended statement of claim the plaintiff contended that his dismissal was invalid on the ground that the decision to dismiss was so C manifestly unreasonable that nobody or persons could have arrived at such a decision. The plaintiff also relied on a plea of breach of natural justice. However, after receiving the defendants' submission the plaintiff agreed to drop this issue of breach of natural justice.

D *Findings of the court*

Relying upon the Supreme Court decision in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 the plaintiff submitted that there are two categories of unreasonableness 'one of which is referred to as comprehensive unreasonableness and the E other is a distinct category of unreasonableness altogether which, with reference to a decision, amounts to any or perverted decision which is a perverse finding, so devoid of plausible justification that no reasonable body of persons could have reached it'.

In fact both these categories of unreasonableness are now known as the Wednesbury principles of unreasonableness because these were first F pronounced by Lord Greene MR in the celebrated case of *Associated Provincial Picture House v Wednesbury Corp* [1948] 1 KB 223.

Needless to say it is a fundamental and a cardinal principle of administrative law that the court in judicial review proceedings, is confined to the decision making process, and not to the decision itself. In *Harpers* G *Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 (SC) Jermuri Serjan SCJ said at p 419:

> ... It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was H fair and reasonable.

However the decision in *R Rama Chandran v The Industrial Court Malaysia & Anor* [1997] 1 MLJ 145 clothed the courts with new and additional powers in judicial review proceedings. The Federal Court was dealing with the decision of the Industrial Court which failed to consider allegations of I bias and victimization as raised by the employee. Eusoff Chin Chief Justice said (at p 178):

> ... The Industrial Court must scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment

having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil Court (s 30 of the Act) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider. In this case, the Industrial Court had totally failed to consider the allegations of misconduct but simply concluded that because the letter of termination was grounded on retrenchment exercise, it is not bound, and therefore, not obliged to consider the issues of bias and misconduct.

For the reasons given we unanimously found that the Industrial Court had come to the wrong conclusion when it decided that the claimant was dismissed with just cause and excuse, and the award must, therefore, be quashed.

The established belief that in judicial review cases the court is confined to investigating the decision making process and not the decision was in the words of Gopal Sri Ram JCA in *Kumpulan Perangsang Selangor Bhd v Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789 at p 797: 'exploded by the landmark decision' in *Rama Chandran.* It must be noted that yet again the *Perangsang* case dealt with a decision of the Industrial Court.

Is the decision in Rama Chandran confined only to matters relating to the Industrial Court?

What I have to consider here is whether the decision in *Rama Chandran* which no doubt has left an impact on industrial law, could be applied to a review of a decision by a public official in the performance of his public duty.

In respect of this issue the plaintiff referred me to a recent decision of the High Court in *Ekambaran a/p Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors* [1997] 2 MLJ 454. In that case the applicant was dismissed from the police force after being charged for wilful disobedience of an order. The learned judge followed the decision in *Rama Chandran* and 'deemed it fit to scrutinize the case, not only in relation to the process but also for substance'. It was urged upon me to follow this decision and to hold that the decision in *Rama Chandran* ought to apply to all judicial review cases.

I do not agree. A decision made in respect of an Industrial Court matter and a decision requiring the dismissal of a public servant call for different approaches by the High Court when called upon to review the said decision. In any case I am of the view that the decision in *Ekambaran* does not support the view as expressed by the plaintiff that in review cases of dismissal by administrative tribunals, the court can look into the merits of the decision. In that case the learned trial judge had allowed the application for certiorari and quashed the order for dismissal on two grounds:

(a) that the tribunal was in breach of the *audi alteram partem* rule; and

(b) that there was a procedural defect by way of an infringement of the rule of natural justice.

It was only in respect of the sentence that the trial judge had applied the decision in *Rama Chandran.* But this view appears clearly to be in conflict with the decision of the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153 which held that the High Court does not have the jurisdiction and power to substitute its own view, for the view of the appropriate disciplinary authority, as to the appropriate penalty for the employee's misconduct.

Proceedings in Industrial Court

In Industrial Court cases there are pleadings. There is also evidence of witnesses presented, after which the court hears the arguments and finally pronounces its judgment. From the decision of the Industrial Court the High Court is under a duty to carry out an objective examination of the factual matrix presented to the Industrial Court to ascertain whether a reasonable tribunal similarly circumstanced would have come to the same decision.

Proceedings in the administrative tribunal

However, it is clear that in respect of dismissal cases by administrative tribunals, only the evidence of the claimant/plaintiff is before the Court and not the evidence of the defendants. In this case the plaintiff was charged under GO 4(2)(g) of the Public Officers (Conduct and Discipline)(Chapter D) General Orders 1980. This was the then subsisting General Orders relating to conduct and discipline. The present orders are regulated by the Perintah-Perintah Am Bab 'D' Peraturan-Peraturan Lembaga Tatatertib Perkhidmatan Awam 1993.

The procedure that must be followed by the Disciplinary Board is set out in Part II of the Tatacara Tatatertib (Disciplinary Procedure). I shall for the purposes of this case, only reproduce the relevant provisions of the said Disciplinary Procedure from the Public Officers (Conduct and Disciplinary)(Chapter D) General Orders 1980:

> 23 In all disciplinary proceedings under this Part no officer shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard:
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> Provided that this General Order shall not apply to the following cases:
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> (a) Where the appropriate Disciplinary Authority is satisfied that for some reason, to be recorded by it in writing, it is not reasonably practicable to carry out the requirements of this General Order; or
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> (b) Where the Yang di-Pertuan Agong is satisfied that in the interest of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this General Order.

24 In every case of an alleged breach of discipline by any officer except as provided for under General Order 27(a) and (b), the Chairman of the Appropriate Disciplinary Authority shall, in the first instance, before commencing any disciplinary proceeding in the matter, consider whether the breach of discipline complained of is a nature which merits a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank.

25 (1) Where the Chairman of the Appropriate Disciplinary Authority decides under General Order 24 that the breach of discipline alleged merits punishment lesser than dismissal or reduction in rank, the officer shall be informed in writing of the facts of the breach of discipline alleged against him and be given an opportunity of making a representation in writing, against the allegation.

(2) After considering the representation under paragraph (1), the Appropriate Disciplinary Authority shall determine whether or not the officer is guilty of the alleged breach of discipline and if it determines that he is guilty thereof it shall impose any one or more of the punishments specified in General Order 36.

26 (1) Where it is represented to, or is found by the Appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.

(2) The Appropriate Disciplinary Authority shall, after considering all the available information in its possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter of representation containing grounds upon which he relies to exculpate himself.

(3) If after consideration of the said representation, the Appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.

(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

(6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determine, shall be required to appear before the Committee and exculpate himself.

(7) If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The Committee may, permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission.

Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented.

(9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the Appropriate Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the officer shall be furnished with a written statement thereof and the same steps shall be taken as are prescribed above in respect of the original grounds.

(10) The Committee having inquired into the matter, shall make a report to the Appropriate Disciplinary Authority. If the Disciplinary Authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report.

(11) If, upon considering the report of the Committee the Appropriate Disciplinary Authority is of the opinion -

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt with under the Pensions Act.'

What is relevant is GO 26(2). In reviewing dismissal cases of public servants, the High Court will not be in a position to assess whether the decision to dismiss is a reasonable decision since the Appropriate Disciplinary Authority's evidence in support of a 'prima facie' case is never before the court. The basis on which the Appropriate Disciplinary Authority arrives at its decision before forwarding to the plaintiff in this case, the statement in writing of the grounds on which it is proposed to dismiss the officer, will never be known. This to my mind is a clear indication of the need to confine judicial review of cases of dismissals by administrative tribunals, only to the decision making process and not to the

decision arrived at. Justice is not just for the individual. Justice must equally prevail for the state. A

I am all the more fortified in holding this view as I find support in the words of Edgar Joseph Jr FCJ in *Rama Chandran* at p 197 where his Lordship said:

> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied. B
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> For example, where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underlie such decisions, courts ought not to review the reasoning of the administrative body, with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of the power on the part of the courts. C

This court will not know what policy considerations motivated the appropriate disciplinary authority in this case to act to dismiss the plaintiff. The plaintiff was accused of allowing a suspect in a drug possession case to escape. What policy consideration the defendants have on matters relating to drugs are within their knowledge. It is therefore inappropriate for this court to enter into the field of circumspection or alternatively, guesswork. D E

It is relevant to cite another passage from the judgment of Edgar Joseph FCJ also from *Rama Chandran* which further emphasises my view that this Court should not apply the decision in *Rama Chandran* to review cases arising from administrative decisions by bodies or persons who are charged with the performance of public acts or duties. His Lordship said at p 198: F

> It must be remembered that we are here concerned with an appeal which arises from Judicial Review proceedings whose target was an Award of the Industrial Court, an inferior court, and not an administrative decision by bodies or persons who are charged with the performance of public acts or duties. It cannot be said, therefore, that by intervening in the manner which we propose to do, we would be trespassing into the domain of the executive, thus violating the doctrine of the separation of powers, and so acting undemocratically.' G

This is yet another ground that ought to be considered. Any judicial interference, in matters where the executive had exclusive information and upon which it had acted, could be readily construed as judicial encroachment upon the independence of the executive. Needless to say Gopal Sri Ram JCA must have had this in mind when he said in *Kumpulan Perangsang* at p 799: H

> ... Unlike the executive, the judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations. I

A Procedure fully complied

It must be noted that there has been no complaint by the plaintiff of any procedural irregularity in this case. In the circumstances since all the required procedures pursuant to GO 23 and GO 26 of the Public Officers (Conduct and Discipline)(Chapter D) General Orders 1980 have been
B complied with, this application for judicial review is ill-founded and must be dismissed with costs.

Application dismissed with costs.

Reported by Zahid Taib

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